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Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1531

IN RE: 1975-2 GRAND JURY INVESTIGATION OF ASSOCIATED MILK PRODUCERS, INC.

BRIEF OF RESPONDENT THE NATIONAL FARMERS' ORGANIZATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD A. GREEN
IVOR C. ARMISTEAD, III
ROWLEY, GREEN, HOCHBERG
& FAIRMAN
1990 M Street, N.W.
Washington, D.C. 20036
(202) 293-2170

Attorneys for Respondent, The National Farmers' Organization, Inc.

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Respondent, The National Farmers' Organization, Inc., ("NFO") respectfully submits that the Court should deny the Petition for Writ of Certiorari filed on April 25, 1978 by Associated Milk Producers, Inc., ("AMPI").

QUESTIONS PRESENTED

1. Whether an order which merely transfers grand jury materials to another district court for review and possible disclosure is appealable under 28 U.S.C. § 1291.

2. Whether rulings on motions questioning the propriety of grand jury proceedings are appealable at the time the district court has simply ordered transfer

of certain grand jury materials to another district court for its consideration as to whether they should be disclosed.

3. Whether, under the facts of the instant case, an order granting intervention to a third party interested in the proceedings related to the transfer of grand jury materials is immediately appealable.

STATEMENT OF THE CASE

The issues presented by AMPI's Petition arise from the issuance of a "housekeeping" order by a federal judge who had supervised a grand jury proceeding in the Western District of Texas. The order makes an inventory of grand jury materials available to another federal judge presiding over private antitrust litigation in the Western District of Missouri for his determination as to whether there should be any disclosure of grand jury materials in that litigation pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. In attacking the validity of the transfer order, AMPI also raises issues with respect to two earlier orders issued during the grand jury proceedings and an order permitting NFO to intervene in the proceedings related to the transfer of grand jury materials.

The grand jury proceeding was instituted in February 1975 in the Western District of Texas to investigate alleged obstruction of justice by AMPI, its officers, employees, agents and attorneys, during proceedings in several antitrust actions which have formed part of the Midwest Milk Monopolization Litigation, JPML Docket No. 83, pending before Chief Judge Oliver in the Western District of Missouri. Among the civil antitrust cases comprising JPML Docket No. 83 is *Alexander* v. *The National Farmers' Organization,*

Inc., Civil Action No. 19191-1 (W.D. Mo.) in which NFO as a counterclaim plaintiff has charged AMPI and others with violations of the federal antitrust laws and is defending an antitrust counterclaim asserted against it by AMPI. In January 1974 NFO filed a motion under Rule 37 of the Federal Rules of Civil Procedure charging that AMPI had destroyed, concealed and withheld evidence during discovery, and seeking sanctions against AMPI.[1] During the proceedings on NFO's sanctions motion AMPI admitted that documents were destroyed by burning, concealed in storage areas under individual names, and temporarily removed from AMPI's offices during discovery visits and document production in the NFO case. Furthermore, in testimony before the Senate Watergate Committee, a high-ranking official of AMPI testified that he had advised AMPI personnel to destroy documents in light of the NFO case, and they had done so.[2]

Although the grand jury investigating AMPI's actions was convened in San Antonio, Texas, where AMPI has its headquarters, there has always been an indisputable nexus between the multidistrict litigation before Chief Judge Oliver, and the grand jury proceeding in the Western District of Texas, supervised by Chief Judge Spears.

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[1] NFO's claims against AMPI and the other counterclaim defendants are now being tried before Chief Judge Oliver. NFO's motion for sanctions under Rule 37 has not yet been decided.

[2] Watergate and Related Activities, Milk Fund Investigation: Executive Session Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate, 93rd Cong., 1st Sess., pp. 6894-96, December 21, 1973, Testimony of David L. Parr.

The grand jury was discharged on August 6, 1976 without returning any indictments. Prior to discharge, however, it requested that custody of certain of the documents and transcripts of its proceedings be retained and that the business files and records of AMPI received by the grand jury be made available to other courts pursuant to an appropriate Rule 6(e) motion. (App. to the Petition pp. 25a-26a) On August 25, 1976, in response to this request and a statement from the Department of Justice that some documents and transcripts of testimony taken by the grand jury may be material to the JPML Docket No. 83 cases, and that the United States had no objection to entry of an appropriate order to make grand jury subpoenas, transcripts and documents available to the court in Missouri, (App. to the Petition pp. 28a-31a) Chief Judge Spears ordered disclosure of the grand jury materials to Chief Judge Oliver.

On August 31, 1976, AMPI asked Chief Judge Spears to reconsider his transfer order and for return of all documents produced by it to the grand jury. In a later memorandum AMPI requested further that documents produced to the grand jury by others be returned and that all of the grand jury subpoenas and testimony transcripts be suppressed and destroyed.

After a hearing on October 1, 1976, Chief Judge Spears modified his August 25, 1976 order by directing the clerk to transfer only an inventory of the grand jury materials to Chief Judge Oliver for *in camera* inspection, and to transfer the materials themselves only after Chief Judge Oliver certified that transfer of the materials was warranted. (App. to the Petition pp. 22a-23a) This order was stayed pending appeal.

On October 8, 1976 AMPI noticed an appeal of the October 1, 1976 transfer order. It subsequently amended its notice to include Chief Judge Spears' orders of February 19, 1975, May 6, 1975 and November 4, 1976. The orders of February 19 and May 6, 1975 had denied AMPI motions to quash or modify the subpoena issued to it by the grand jury, to stay the grand jury proceedings, and for an evidentiary hearing, all based upon AMPI's claims of defects in the grand jury proceedings. (App. to the Petition pp. 20a-21a) The order of November 4, 1976 granted NFO's motion to intervene as of right in the Texas proceedings pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. (App. to the Petition p. 24a) The basis for NFO's motion was that, under the August 25, 1976 transfer order, NFO had already moved before Chief Judge Oliver for disclosure of the grand jury materials pursuant to Rule 6(e), Fed. R. Crim. Pro., and would be aggrieved by the destruction of grand jury materials requested by AMPI.

In an opinion issued on February 6, 1978, the United States Court of Appeals for the Fifth Circuit dismissed AMPI's appeal, ruling that none of Chief Judge Spears' orders was final and appealable under 28 U.S.C. § 1291. As to the October 1, 1976 transfer order, the court of appeals stated that it was "no more than a decision to permit Chief Judge Oliver to decide whether the materials should be disclosed in JPML Docket No. 83. This is precisely the type of 'tentative, informal [and] incomplete' interlocutory decision that Congress in passing section 1291 intended to preclude from immediate review." (App. to the Petition p. 16a)

REASONS FOR DENYING THE WRIT

AMPI's Petition fails utterly to meet the established criteria for review on writ of certiorari. The decision of the court of appeals below, that the orders in question are not presently appealable, is not in substantial conflict with a decision of any other circuit, the case does not present any unique or important question of federal law to be settled by this Court, and there is nothing in the decision below which can be properly characterized as a departure from the accepted and usual course of judicial proceeding. Moreover, the decision below was reasonable and correct.

I. Orders Permitting the Mere Transfer of Grand Jury Materials to Another Federal Court Are Not Final and Appealable Under 28 U.S.C. § 1291.

At the heart of this proceeding is the October 1, 1976 order allowing the transfer of grand jury materials from the district court in Texas to Chief Judge Oliver in Missouri for review and possible disclosure. AMPI has steadfastly sought to avoid any disclosure and, although the Petition asserts irreparable injury and great prejudice if an appeal is not immediately allowed, it is obvious that the October 1 order would neither cause disclosure nor foreclose adequate appellate review. As the court of appeals stated:

> It is not now apparent whether any, all, or none of the grand jury materials at issue in this case will be disclosed in JPML Docket No. 83. No one has yet been aggrieved and no one will become aggrieved until Chief Judge Oliver acts. Until then there is no appealable final order. (App. to the Petition pp. 16a-17a)

In reaching its conclusions, the court of appeals below discussed at length the final judgment rule, its genesis and application in the federal courts. After its careful review of the law, in particular this Court's decisions in *Cobbledick* v. *United States,* 309 U.S. 323 (1940); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949); and *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964); the court of appeals came to the conclusion that the transfer order was interlocutory, and that, using a "practical" approach to the matter, any danger of denying justice through delay was outweighed by the inconvenience and cost of piecemeal review.

AMPI's Petition contains nothing of substance to contradict these findings. It contains only conclusory assertions that the rule of practical finality mandates immediate appellate review, and that AMPI "will be forever denied an opportunity to obtain meaningful review of the orders in issue unless this Court reviews the decision below." (Petition p. 14) These statements are, however, plainly wrong.

The purpose of the final judgment requirement of 28 U.S.C. § 1291 is to aid the administration of justice by avoiding the delay, harassment and cost of piecemeal appellate review. *Cobbledick* v. *United States,* 309 U.S. 323, 325 (1940). The rule is not intended to be rigidly applied, and this Court has stressed that section 1291 should be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). "[I]n deciding the question of finality the most important competing considerations are 'the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie* v. *United*

States Steel Corp., 379 U.S. 148, 152-153 (1964), *quoting, Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Applying these principles, it is apparent that the court of appeals correctly concluded that the transfer order of Chief Judge Spears is unappealable. Ample review will be available without prejudice to AMPI after Chief Judge Oliver considers and rules on motions for disclosure in the Missouri proceeding.[3]

This view is supported by the prior appellate cases most closely analogous to these proceedings. In both *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (2d Cir. 1963), and *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074 (2d Cir. 1974), the court of appeals ruled that orders transferring grand jury materials to another district court for review and possible disclosure were interlocutory and not appealable. In *Baker*, Judge Mansfield properly viewed the transfer order as:

> merely a mechanical step taken as a matter of "judicial administration" for the purpose of enabling the [transferee] district court to have the

[3] The appropriate timing of any appellate review of determinations made by Chief Judge Oliver may turn upon the nature of such rulings. Existing case law suggests that, while denials of disclosure of grand jury materials may be immediately reviewable, *Illinois* v. *Sarbaugh*, 552 F. 2d 768 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co., Inc.* v. *Illinois*, —— U.S. ——, 98 S. Ct. 262 (1977); *Gibson* v. *United States*, 403 F.2d 166 (D.C. Cir. 1968), orders granting disclosure are interlocutory and not appealable until after judgment, *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (2d Cir. 1963); *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074 (2d Cir. 1974). *But cf. Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127 (9th Cir. 1978), *cert. petition filed sub nom., Douglas Oil Co.* v. *Petrol Stops Northwest*, No. 77-1547 (April 28, 1978).

> essential evidence before it so that the substantive issue could be resolved by it, subject to ultimate review upon entry of a final judgment on the merits in that proceeding. 492 F. 2d at 1078.

Discussion of these cases is absent from the Petition. Instead, AMPI attempts to rely upon *Illinois* v. *Sarbaugh*, 552 F. 2d 768 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co., Inc.* v. *Illinois*, —— U.S. ——, 98 S. Ct. 262 (1977); and *Gibson* v. *United States*, 403 F. 2d 166 (D.C. Cir. 1968), in support of its contention that the transfer order is appealable at this time and that a conflict exists among the circuits on this issue. Both cases are, however, inapposite. In *Sarbaugh*, a case with some similarities to this proceeding, the treble damage plaintiff sought Rule 6(e) disclosure directly from the district court which had supervised the earlier grand jury proceeding. The request was denied, the court ruling that the treble damage plaintiff had not made the requisite particularized showing of compelling necessity. Ruling that a *denial* of *disclosure* was appealable, the Seventh Circuit itself recognized the distinction between the facts before it and situations where motions for disclosure, or transfer to another court, were granted. *See* 552 F. 2d at 773-774. *Gibson* v. *United States, supra*, is likewise distinguishable.

II. Transfer of Grand Jury Materials to the Western District of Missouri Would Not Constitute Rule 6(e) Disclosure.

Included in AMPI's argument for immediate appeal is the suggestion that transfer of the grand jury materials to another district court would breach grand jury secrecy and constitute disclosure under Rule 6(e) of the Federal Rules of Criminal Procedure. This

proposition is critical to AMPI because it is from this conclusion that AMPI looks for support from cases relating to the appealability of Rule 6(e) disclosure orders. But, AMPI offers no competent authority to support its claim that transfer of materials to Chief Judge Oliver would breach the secrecy of the Texas grand jury proceedings. It cites only *In Re: Grand Jury Investigation of the Banana Industry,* 214 F. Supp. 856 (D. Md. 1963), where the United States District Court in Maryland placed certain limits upon the presentation of grand jury transcripts to a second federal grand jury impaneled in California. However, it is clear that neither grand jury secrecy nor Rule 6(e) disclosure were involved in the decision to place restrictions on the California grand jury's access to the transcripts, and that the case does not support AMPI's claim.

The purpose of Rule 6(e), Fed. R. Crim. Pro., is to establish the circumstances and conditions under which "matters occurring before the grand jury" may be disclosed. The rule, however, does not suggest *in camera* review of secret materials by a judge other than the one supervising the grand jury would breach the secrecy and constitute disclosure under the rule. Nor does the rule suggest that the judicial determinations required prior to disclosure must, or should, be made by the court which supervised the grand jury investigation. Indeed, transfer orders for this purpose, such as the October 1, 1976 order issued by Chief Judge Spears, are not unique. Similar techniques have been used in other cases to allow the Rule 6(e) disclosure decisions to be made by the court in charge of the proceeding in which the grand jury materials are sought to be used.

In the Electrical Equipment Cases of the early 1960's a procedure was adopted whereby grand jury testimony of any witness could be released to the "Deposition Judge" in another district on his request. The "Deposition Judge" would examine the testimony and determine whether it should be made available in the proceeding before him. If not, the testimony would be returned to the district court which had supervised the grand jury investigation.[4] An attempted appeal from a disclosure order under this transfer procedure was considered in *Atlantic City Electric Co.* v. *A. B. Chance Co.,* 313 F. 2d 431, 433-34 (2d Cir. 1963). The Second Circuit offered no criticism of the transfer procedure. Furthermore, the court ruled that any review of a disclosure order was properly in the circuit where the disclosure was ordered and rejected the argument that review should be predicated on the transfer order and could only occur in the circuit where the grand jury proceeding had been conducted.

Prior to court reorganization in the District of Columbia, a procedure existed whereby disclosure of United States District Court grand jury materials was conditioned upon certification from the District of Columbia Court of General Sessions when the ultimate prosecution was being conducted in the local court system. In *Gibson* v. *United States,* 403 F. 2d 166 (D.C. Cir. 1968), the court of appeals approved this administrative procedure as a means to allow the disclosure decision to be made by the court in which the case was actually pending and avoid piecemeal review of disclosure decisions.

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[4] *City of Philadelphia* v. *Westinghouse Electric Corp.,* 210 F. Supp. 486, 491 (E.D. Pa. 1962).

More recently, *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074 (2d Cir. 1974), presented a circumstance even closer to this case. A United States District Court in New York, where an antitrust grand jury had earlier returned an indictment, ordered transcripts of grand jury testimony transferred to the United States District Court in Connecticut for *in camera* inspection and possible disclosure in a related treble damage action. Appeals were attempted by the civil defendants from both the transfer order and an order of partial disclosure. In dismissing the appeals, the Second Circuit approved the procedure which allowed the Connecticut court to have the evidence essential to a resolution of the substantive issues before it.[8]

Here, where, in addition to seeking grand jury transcripts for potential trial use, private antitrust claimants are requesting grand jury materials in aid of discovery sanctions motions, it is manifest that Chief Judge Oliver is in the best position to weigh the interests of grand jury secrecy against the necessities of the litigants seeking disclosure. In many cases, the judge nominally supervising the grand jury has very little knowledge of the substance of the investigation. Procedures allowing for transfer and review of grand jury materials by the more interested and informed court are prudent administrative techniques in the context of complex multidistrict litigation. Such transfers, however, do not breach the secrecy of the grand jury and need not themselves be predicated upon findings

[8] The Seventh Circuit recently spoke approvingly of such procedures in *Illinois* v. *Sarbaugh*, 552 F. 2d 768, 773 n.5 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co., Inc.* v. *Illinois*, —— U.S. ——, 98 S. Ct. 262 (1977).

that disclosure is warranted under Rule 6(e) of the Federal Rules of Criminal Procedure. Even more important to this proceeding is the fact that such a judicial "housekeeping" order does not prejudice AMPI, nor present a question worthy of Supreme Court review.

III. The District Court's Orders of February 19, 1975, May 6, 1975, and November 4, 1976 Are Also Unappealable.

In addition to the October 1, 1976 transfer order AMPI has sought appellate review of three other orders of the Texas district court. The first two of these orders, issued on February 19 and May 6, 1975, arose from AMPI's attempts to have the grand jury subpoena issued to it quashed and to stay the Texas grand jury proceedings. These motions were based chiefly upon allegations of impropriety in the authorizations granted to the Department of Justice attorneys conducting the investigation. Although AMPI could have obtained immediate appellate review of these orders by refusing to comply with the subpoena issued by the grand jury and defending a contempt citation, *see United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906), AMPI apparently chose not to seek review in this manner. It now attempts to resurrect its claims in proceedings related to the transfer of grand jury materials for review by another district court.

Whether and to what extent the earlier orders are appealable and, even if erroneous, whether they have any impact on the disclosure question, are issues which need not be decided now. As the court of appeals found, AMPI has made no demonstration that a failure to

obtain current appellate review of these orders will prejudice any of its rights, or that the questions presented come within the recognized exceptions to the final judgment rule.

In an effort to demonstrate that the decision on the appealability of the February 19 and May 6, 1975 orders is worthy of review, AMPI claims that the decision is in conflict with two cases decided by other circuit courts, *United States* v. *Doe,* 455 F. 2d 1270 (1st Cir. 1972), and *Socony Mobil Oil Co.* v. *United States,* 275 F. 2d 227 (7th Cir. 1960). However, a review of these cases readily indicates that they either do not conflict with the decision below, or are so legally and factually distinguishable that no conflict exists sufficient to warrant Supreme Court review.

The remaining order from which AMPI sought to appeal allowed NFO's intervention into the proceedings before the district court in Texas under Rule 24(a) of the Federal Rules of Civil Procedure. It should be noted that, while NFO had participated in an October 1, 1976 hearing before Chief Judge Spears on the subject of the transfer of the grand jury materials to Missouri, its September 24, 1976 motion to intervene was not granted until November 4, 1976, well after the October 1, 1976 transfer order which is at the core of these appellate proceedings. Since the only practical effect of the order granting intervention has been to allow NFO, the acknowledged party with interest in the Missouri proceedings, to participate in AMPI's appeal to the Fifth Circuit and respond to the instant petition, it is hard to conceive of any substantive prejudice which AMPI has suffered as a result of the intervention order. In such a circumstance it was quite appropriate for the court of appeals to rule that it

would not entertain an appeal from this order. It is similarly apparent that this Court should not grant certiorari to review this decision of the Fifth Circuit.

As with the other orders, AMPI's Petition offers simply the facile assertion that the proceedings in the Western District of Texas have ended and that the orders of that court in this matter are *ipso facto* appealable. This argument ignores the substantial body of case law which has developed in the application of 28 U.S.C. § 1291. The court of appeals below was correct when it found that the orders issued by Chief Judge Spears were merely preliminary to the review and consideration of the disclosure question by Chief Judge Oliver in the JPML Docket No. 83 proceedings, and, thus, unappealable. From the "practical" approach to construing finality established by this Court in *Cohen* v. *Beneficial Industrial Loan Corp., supra,* and the related line of cases, the decision below is flawless, and AMPI's Petition provides no substantial reason for this Court to grant the writ and review the Fifth Circuit in this case.

CONCLUSION

For these reasons, The National Farmers' Organization, Inc., requests that the Petition of Associated Milk Producers, Inc., for a Writ of Certiorari be denied.

Respectfully submitted,

RICHARD A. GREEN
IVOR C. ARMISTEAD, III
ROWLEY, GREEN, HOCHBERG
& FAIRMAN
1990 M Street, N.W.
Washington, D.C. 20036
(202) 293-2170

Attorneys for Respondent,
The National Farmers' Organization,
Inc.